**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL MISC.APPLICATION No. 5713 of 2006**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE AKIL KURESHI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**VISHAL JASHWANTLAL PATEL - Applicant(s)**
**Versus**
**ATUL BABULAL SHAH & 1 - Respondent(s)**

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**Appearance :**
MR TS NANAVATI for Applicant(s) : 1,
MR BHARGAV BHATT WITH MR RAJESH R DEWAL for Respondent(s) : 1,
MR AY KOGJE, APP for Respondent(s) : 2,

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**CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**

**Date : 01/05/2007**

**ORAL JUDGMENT**

1. This application has been filed by the original complainant seeking recall/review of an order dated 2nd May, 2006 passed by this Court in

Special Criminal Application No.788 of 2006.

2. Following facts give rise to this application :

2.1 The applicant herein is the original complainant who had filed a complaint giving rise to inquiry case no. 59/2002 dated 31st December, 2002 which is pending before the learned Metropolitan Magistrate Court, Ahmedabad. The complainant had alleged certain irregularities and illegalities with respect to an immovable property in the nature of flat/complex situated in Paldi area of Ahmedabad.

2.2 Learned Magistrate passed an order of inquiry under Section 202 of Criminal Procedure Code on the complaint filed by the applicant and called for report from the police. The police submitted the report dated 25th August, 2003 pursuant to the directions of the Magistrate. Dissatisfied by the manner in which the investigation was carried out by the police and report ultimately submitted, the applicant herein filed an application on 24th December, 2003 before the learned Magistrate seeking further investigation under Section 173(8) of Criminal Procedure Code. Learned Magistrate passed an order on the said application of the complainant on 17th September, 2005 and accepted the request for further investigation under

Section 173(8) of the Criminal Procedure Code. The Magistrate called for a report within a period of 60 days from the police. Such further report also came to be filed on 8th December, 2005. Further investigation reveals involvement of some more accused persons including one Atul Babulal Shah, respondent no.1 herein.

2.3 The applicant herein thereupon moved an application before the Magistrate on 17-21/1/2006 and sought issuance of non bailable warrants against the accused persons including respondent no.1 herein. Learned Magistrate passed an order dated 21st February, 2006 on the application filed by the complainant-applicant herein and granted the request for issuance of non bailable warrant against the accused persons including respondent no.1 herein returnable on 27th March, 2006. While passing the said order learned Magistrate observed that report dated 9th December, 2005 has been submitted which disclosed involvement of the accused persons in serious offences punishable under Sections 403,406,409,417,418,419,420,447,448,467,468,469, 471,472,473,474,475,476 read with Sections 120-B and 114 of Indian Penal Code. Considering the report submitted and the reasons indicated by the complainant in the application, in the interest of justice, order of non bailable warrant was issued.

2.4 Respondent no.1 herein thereupon approached the learned Magistrate and requested for cancellation of non bailable warrant. Some other connected applications were also filed with which we are not directly concerned. The application of respondent no.1 herein seeking cancellation of non bailable warrant filed by him on 23rd March, 2006 was kept for hearing on 3rd May, 2006. It was at that stage that respondent no.1 herein moved this Court by filing Special Criminal Application No.788/2006 and prayed that the non bailable warrant issued by learned Magistrate by an order dated 21st February, 2006, either be converted into bailable warrant or the warrant be quashed altogether. It may be noted that in the said application, accused respondent no.1 herein joined only State of Gujarat as party and did not join original complainant i.e. the applicant herein as a party respondent.

2.5 Learned Single Judge of this Court on 2nd May, 2005 after issuing rule and hearing learned APP appearing for State, considering the record of the case and that there is no justification for the learned Magistrate to issue non bailable warrant, also the factor that application under Section 70(2) of Criminal Procedure Code filed by respondent no.1 herein is pending before the learned Magistrate, found it just and proper to order conversion of non

bailable warrant into one of bailable warrant of sum of Rs. 2,000/- with a direction to respondent no.1 herein to remain present before the learned Metropolitan Magistrate, Court No.22, Ahmedabad on 3rd May, 2006 at 11 a.m.

3. It is this order passed by the Learned Single Judge of this Court which has given rise to the present petition at the hands of the original complainant.

4. The main thrust of the argument of the complainant is that learned Magistrate was seized of the matter, that it was proceeding arising out of private complaint, that the Magistrate had ordered inquiry under Section 202 of Criminal Procedure Code and, therefore, before passing any order with respect to issuance of non bailable warrant by learned Magistrate, it was absolutely essential for the Court to hear the complainant i.e. the applicant herein. It is primarily on this ground that application is sought to be sustained.

5. It is additionally contended that there are serious allegations against respondent no.1 and other accused persons having committed several offences of cheating etc. punishable under various provisions of Indian Penal Code. When the learned Magistrate had exercised discretionary power of granting non bailable

warrant, same ought not to have been cancelled without hearing the complainant.

6. Appearing for the applicant, learned advocate Shri T.S. Nanavati submitted that the applicant had lodged a complaint before the Magistrate in which inquiry was ordered under Section 202 of Criminal Procedure Code. Upon submission of report by the police, the complainant moved the learned Magistrate and secured an order of further investigation which report was also submitted by the police revealing substantial material against all accused persons including respondent no.1 herein to proceed further for having committed offences punishable under Sections 403,406,409,417,418,419,420,447,448,467,468,469, 471,472,473,474,475,476 read with Sections 120-B and 114 of Indian Penal Code.

6.1 It is contended that all through out it is the complainant who is in charge of the prosecution. It is submitted that this is not a case instituted on a police report. It is contended that it is a case instituted on private complaint and that therefore, the complainant would be the only vital and necessary party who should be heard before modifying the order passed by the learned Magistrate. It was further contended that the proceedings were alive before learned

Magistrate. Respondent no.1 had filed an application under Section 70(2) of the Criminal Procedure Code seeking recall of the non bailable warrant which application was pending before the Magistrate and next date of hearing was fixed on 3rd May, 2006. At that stage without joining the complainant as a party, respondent no.1 herein approached this Court and on 2nd May, 2006, itself matter was finally disposed of converting non bailable warrant into one of bailable warrant. He submitted that without hearing the applicant herein, same could not have been done.

6.2 It is further pointed out that under very similar circumstances other co-accused persons namely, one Gaurav Jayantilal Modi and others also approached this Court by filing Special Criminal Application No.806/2006 in which the same learned Judge upon intervention by the complainant refused to pass similar order and ultimately Special Criminal Application came to be withdrawn on 4th May, 2006 with a view to approaching the learned Magistrate under Section 70(2) of the Criminal Procedure Code.

7. On the other hand appearing for respondent no.1, learned advocate Shri Bhargav Bhatt strongly opposed this petition. He submitted that the applicant has prayed for review of an order passed by Learned Single Judge of this Court. It

is well settled that in criminal law, there is no scope for granting prayer for review. It was further submitted that the applicant herein was neither a necessary nor a proper party in Special Criminal Application No. 788/2006 filed by respondent no.1. He submitted that initially the proceedings before the Magistrate initiated on private complaint and the Magistrate did order an inquiry under Section 202 of Criminal Procedure Code and called for a report however, the actual report filed by the police was under Section 173(2) of the Criminal Procedure Code. In fact being dissatisfied with the investigation, the complainant himself moved an application before the learned Magistrate urging the learned Magistrate to order further investigation under Sub-section(8) of Section 173 of the Criminal Procedure Code and such an application was also granted. The police submitted further report. All this, according to the learned advocate would demonstrate that what is being tried by learned Magistrate is not the proceeding arising out of a private complaint but is being treated by all concerned including the complainant himself as one arising out of the police report. According to learned Counsel therefore, State is the only necessary and proper party.

7.2 Learned advocate Shri Bhargav Bhatt further submitted that as per the Gujarat High

Court Rules in all criminal cases, State is a necessary party and respondent no.1 herein had therefore, joined State in Special Criminal Application No.788/2006 filed by him. He submitted that once the Magistrate was conducting a criminal case arising out of police report, the original complainant lost his locus standi and would not be further in a position to control the trial. It would be entirely for the State Agency and the Pubic Prosecutor to conduct the trial and eventually upon adverse result, it is only the State which can appeal against the ultimate decision of the trial Court.

7.3 It is further submitted that even if there has been breach of principles of natural justice, it would not be open for this Court to recall the order dated 2nd May, 2006. It is further contended that in any case the order passed by learned Single Judge was perfectly in order. Learned Magistrate passed an order issuing non bailable warrant without there being sufficient reasons in support thereof. He submitted that this Court therefore, correctly converted an order of non bailable warrant into bailable warrant finding that in case of other co-accused persons, same learned Magistrate had issued bailable warrants.

7.4 Reliance was placed on the decision of

Division Bench of this Court in case of **Ajit D. Padiwal v. State of Gujarat and ors.** reported in 2005(1) GLR 743, wherein it was observed that ordinarily the Magistrate should not resort to issuance of non bailable warrant straightway and at first instance normally process of summons and only if circumstances of the case so demand, bailable warrant should be issued.

7.5 For the same purpose, reliance is also placed on an unreported decision of this Court in case of **Dipak Navnitlal Parikh & others v. The State of Gujarat & another** (1995(1) GLH(UJ) 25). In the said decision, learned Judge observed that unless there are reasons to believe that the accused have absconded or that they will not obey the summons, and for which detailed reasons are recorded in writing by the Court then straightway non-bailable warrants cannot be issued.

8. Having heard learned advocates appearing for the parties, I find that there is no dispute that the applicant herein was the original complainant before the Magistrate alleging large scale irregularities and illegalities with respect to certain immovable property. Upon such complaint, learned Magistrate issued an order calling for report in terms of Sub-section(2) of Section 202 of Criminal Procedure Code.

9. It is also not in dispute that pursuant to the said order passed by the learned Magistrate in the year 2003, the police did submit a report. The complainant however, not being satisfied with such investigation and report sought further investigation which request was also granted by the learned Magistrate. The police thereupon carried out further investigation and filed a further report.

10. It is true that the complainant himself in his application for further investigation has placed reliance on Sub-section(8) of Section 173 of the Criminal Procedure Code. It is equally true that learned Magistrate also accepted such a request and called for a further report from the police terming it as one under Section 173(8) of the Criminal Procedure Code.

11. Learned advocate Shri Bhargav Bhatt appears to be correct in submitting that report envisaged under Section 173 of the Criminal Procedure Code is one arising out of proceeding under Section 154 or 156 of the Criminal Procedure Code since the beginning words of Sub-section(1) of Section 173 say that “every investigation under this chapter shall be completed without unnecessary delay”. Section 173 is placed in Chapter XII of the Criminal Procedure Code. Report under Section 173 therefore, is a culmination of investigation carried out by the police under

Chapter XII of the Criminal Procedure Code. However, I cannot lose sight of the fact that at the very outset learned Magistrate had ordered an inquiry under Section 202 of the Criminal Procedure Code and not called for investigation by the police and report thereupon under Sub-section(3) of Section 156 of the Criminal Procedure Code. Therefore, in my view despite a degree of inaccuracy in stating the provisions of law, the entire proceeding will still remain as one arising out of the private complaint. As noted earlier, since this complaint is not investigated by the police under Sub-section(3) of Section 156 at the instance of the Magistrate, proceeding continue to be one instituted otherwise than a police report.

12. In that view of the matter, the complainant was vitally interested in following the progress of the trial. He would be the one who would be in-charge of the trial and not the Public Prosecutor as would be the case when the Magistrate is conducting the trial in a case arising out of the police report. One of the significant differences between the two situations is to be found in the right of appeal in case of acquittal of the accused persons. As per Sub-section(4) of Section 378 of the Criminal Procedure Code, in case of acquittal in any case instituted by the complainant, the complainant with a leave of High Court can

appeal against the order of acquittal. In a case arising out of police report, however, there would be no such right to the complainant to file appeal even with the leave of the High Court. All these would demonstrate that it was the complainant who was vitally interested in the proceeding and, therefore, had a certain locus to oppose any modification of the order passed by the learned Magistrate. In that view of the matter, I find that learned advocate Shri T.S. Nanavati is justified in submitting that respondent no.1 herein ought to have joined present applicant in Special Criminal Application No.788/2006 filed seeking modification of non bailable warrant issued by learned Magistrate.

13. Learned advocate Shri Bhargav Bhatt submitted that issuance of summons or warrant under Section 204 of Criminal Procedure Code is a discretion of learned Magistrate and the complainant has no say in the matter. I am afraid this contention cannot be accepted. Any order that Magistrate may pass would be of vital interest to the complainant. Even if learned Magistrate enjoyed considerable degree of discretion in this regard, such discretion is to be exercised for valid reasons and within well laid down judicial parameters. In any case, the question here is not one of issuance of non-bailable warrant by the Magistrate but of

cancellation of non-bailable warrant already issued.

14. It is however, not true that without disclosing full facts, respondent no.1 herein obtained an order on 2nd May, 2006 from this Court. I have perused the entire petition being Special Criminal Application No.788/2006 and all material facts disclosed by the applicant herein have been stated in the said petition as well.

15. It may be noted that since this petition has been filed with a prayer for recalling/review of the order passed on 2nd May, 2006, the same was initially placed before the same Learned Single Judge who had passed the order. However, Learned Single Judge subsequently, had some inhibition in taking up the petition and the same was thereafter, in turn, placed before me.

16. I am unable to accept the contention of learned advocate Shri Bhargav Bhatt for respondent no.1 that order dated 2nd May, 2006 cannot be recalled under any circumstances. It is well settled that in criminal jurisdiction, there is no power of review once the order is passed, however, recalling of an order on certain fundamental grounds such as non hearing of necessary party cannot be equated with review of an order on merits.

17. The question however, is despite all this, should order dated 2nd May, 2006 be recalled.

18. I have perused the order passed by the learned Magistrate on 21st February, 2006. I have also taken brief note of contents thereof in the earlier part of this judgement. The applicant herein had moved an application for securing non bailable warrant from the learned Magistrate. One of the main grounds urged in the said application was that the accused persons are absconding and would not be easily available for trial. Learned Magistrate in his order only recorded that reasons stated in the application seem to be correct and, therefore, in the interest of justice, he was pleased to order non bailable warrant against 15 persons who were shown as accused in the said criminal case. There was no further elaboration as to why the learned Magistrate was of the opinion that respondent no.1 herein would not be available for trial or that he would abscond if less harsher method of securing his presence at initial stage is resorted to by issuance of either summons or bailable warrant. Under Section 204 of the Criminal Procedure Code in case the Magistrate is taking cognizance of warrant case and the Magistrate finds sufficient grounds for proceeding, he may issue a warrant or if he thinks fit summons for causing the accused to be brought or to appear before a

certain time before the Magistrate or before some other Magistrate having jurisdiction if such Magistrate has no jurisdiction himself.

19. Sub-section(1) of Section 204 reads as follows:

> "204.Issue of process. (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-
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> (a) a summons-case, he shall issue his summons for the attendance of the accused, or
>
> (b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction."

20. Thus even in a warrant case it is discretion of the Magistrate to either issue warrant or issue summons for causing the accused to be brought before the Court. Issuance of non bailable warrant therefore, would not be a matter of routine and unless there are strong reasons, learned Magistrate cannot issue straightway non bailable warrant. This is precisely what is stated by the Division Bench of this Court in case of **Ajit D. Padiwal v. State of Gujarat and ors.** (supra) wherein it is observed that process of summons should only be issued at first instance and only if circumstances of case demand, bailable warrant should be resorted to. It is observed that unless there are reasons to

believe that the accused have absconded or that they will not obey the summons and only upon recording of detailed reasons in writing to come to such a conclusion, the Magistrate would be able to issue non bailable warrant. However, without following the said requirement it would not be open for the Magistrate to issue straightway non bailable warrant. This was also the view of Learned Single Judge of this Court in case of **Dipak Navnitlal Parikh & others v. The State of Gujarat & another** (supra).

21. In view of this legal position, I find that the learned Magistrate had not recorded satisfactory reasons for straightway resorting to extremely stringent measure of issuance of non bailable warrant without satisfying himself whether a less harsher method of issuance of summons or bailable warrant would not serve the purpose of securing the presence of the accused.

22. As noted earlier the complainant had only stated that the accused persons are absconding and are not likely to be available for trial. Learned Magistrate only stated that he agrees with reasons stated in the application and that therefore, in the interest of justice non bailable warrants be issued. It was this order that Learned Single Judge of this Court modified into one of bailable warrant and also ensured that accused remained present before the

Magistrate on the very next date of the passing of the order by directing his presence on 3rd May, 2006 before th Magistrate. The very purpose of issuance of summons or warrant bailable or non bailable, under Section 204 of the Criminal Procedure Code is to secure the presence of the accused before the Magistrate. Thus having achieved the said purpose and modifying an order passed by the Magistrate which had sought to achieve the same purpose, however through a more stringent manner, I do not see any possibility of recalling that order even if in principle I agree with the submission of learned Counsel for the applicant that applicant ought to have been heard before this Court passed the above mentioned order on 2nd May, 2006. Surely, only for cosmetic purpose, this Court would not be recalling an order and passing the same order all over again if ultimately, the result would remain unchanged.

23. In the result, this application is turned down. Same stands rejected. Rule is discharged.

**(Akil Kureshi,J.)**

(raghu)